

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	MD Docket No. 13-163
)	
Amendment of the Schedule of)	GEN Docket No. 86-285
Application Fees Set Forth In)	
Sections 1.1102 through 1.1109)	
of the Commission's Rules)	

To: The Commission

APPLICATION FOR REVIEW

Hispanic Target Media, Inc. ("HTM"), Ramar Communications Inc. and Simon T ("Auction Winners") hereby seek review of the six decisions of the Office of Managing Director attached at Exhibit A (the "Refund Decisions"). The Refund Decisions are all dated March 27, 2013, and each denies a request for refund of filing fees paid by Auction Winners with their long-form applications for construction permits filed at the conclusion of an auction at which they were winning bidders.

The Refund Decisions are for all relevant purposes identical. With one exception, each of the underlying requests requested refund of payments of the long-form application filing fees on the ground that the filing fees had been collected in violation of Section 1.2107(c) of the Commission's Rules, 47 C.F.R. § 1.2107(c), which at the time of application filing provided: "Notwithstanding any other provision in title 47 of the Code of Federal Regulations to the contrary, high bidders need not submit an additional filing fee with their long-form applications."

In denying the requests, the decisions rely on dictum from a 1998 Commission decision. In that decision, which spanned 136 pages and dealt with broadcast auctions generally, and in particular with the question of how to process applications for new stations that had been filed prior to adoption of auction rules, the Commission made the following observation: "The statutorily established application fees will apply to the long-form applications filed by winning auction bidders." *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, 13 FCC Rcd 15920, 15984 ¶ 164 (1998) ("First Report & Order"). The Commission did not anywhere else in the First Report & Order discuss long-form application filing fees. The First Report & Order did not even mention Section 1.2107(c), much less purport to adopt a new rule or modify that rule, which provided that *notwithstanding* any other rule to the contrary, winning auction bidders are not required to pay long-form application filing fees. In context, the one-sentence statement appears to be nothing more than a rote observation in direct conflict with the plain language of Section 1.2107(c).

For their part, the Refund Decisions do nothing to reconcile this inconsistency between the one-sentence observation in the First Report & Order, unaccompanied by any change to Section 1.2107(c) itself, and the clear "notwithstanding" language of Section 1.2107(c). Instead, the Refund Decisions pretend that the Commission actually adopted a new rule in 1998, and cite the Auction Winners' payment of the filing fees as evidence that they had actual knowledge of the rule change. This rationale fails for three reasons.

First, it ignores that Auction Winners were required by the Commission to pay the filing fee on penalty of forfeiture of their winning auction bids. Auction Winners' compliance, however, with an unlawful requirement does not constitute a waiver of the right to challenge it. Indeed, the Commission requires compliance with its rules, even while a challenge to the lawfulness of a rule is pending. *See, e.g.*, 47 C.F.R. § 1.429(k) ("Without special order of the Commission, the filing of a petition for reconsideration shall not excuse any person from complying with any rule . . ."); 47 U.S.C. § 405(a) (No petition for reconsideration "shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission . . .").

Second, by stating that Auction Winners had "actual and timely knowledge of the requirement" that broadcast auction winners must pay long-form application filing fees, the Refund Decisions suggest that a basis for Auction Winners' refund requests is that the Commission failed to publish the new "rule" in the Federal Register. This is not true. Auction Winners did not make that argument. Their refund requests contain no mention of lack of notice of the "rule." Rather, Auction Winners contend that no such rule existed. The Commission's failure to publish notice in 1998 of the purported change to Section 1.2107(c) is relevant to the argument that Auction Winners *actually* made, only because the Commission's failure to publish notices evidences that the Commission itself did not believe in 1998 that it had changed the rule.¹

Third, the two cases cited in the Refund Decisions for the proposition that "actual notice" trumps lack of Federal Register notice are inapposite. As made clear above, Auction Winners do not contend that the Commission failed to give notice of a new rule

¹ In any event, as Auction Winners have shown above, Section 1.2107(c) would have nullified any "requirement" in 1998 that an auction winner pay an application fee.

in 1998, but rather that the Commission never adopted any such rule. In the cited cases, however, neither appellant challenged the underlying rule as invalidly adopted under the Administrative Procedure Act. Rather, each argued that it could not be penalized for failure to comply with the rules, because the rules had not been published in the Federal Register. Indeed, in *U.S. v. Aarons*, Judge Friendly specifically noted, “We are not here dealing with a case where the rule-making procedures prescribed by § 4 of the APA have not been followed, as to which, in some instances, different considerations may apply” 310 F.2d 341, 348 n.3 (2d Cir. 1962).

In this regard, Auction Winners note that the Commission’s recent attempt to effectuate publication of the “rule” purportedly adopted in 1998 is an attempt at misdirection. On March 27, 2013 (which is also the date of the Refund Decisions), the Commission published a “corrected” summary of the First Report & Order. The “correction” contained notice that the First Report & Order adopted a requirement that broadcast auction winners pay long-form application filing fees. 78 Fed. Reg. 18527 (March 27, 2013). To reiterate, Auction Winners contend not that the Commission failed to give Federal Register notice of the new “rule,” although it is true that it did not, but rather that the Commission adopted no such rule in 1998. In any event, the Commission cannot now give notice of something it did not do fifteen years ago. Auction Winners have therefore petitioned for reconsideration of the First Report & Order to the extent that the Commission interprets it as adopting such a requirement.²

² See Petition for Reconsideration filed April 24, 2013 in MM Docket No. 97-234. The Commission’s failure to give Federal Register notice of the new “rule” had previously deprived Auction Winners of the opportunity to challenge the adoption of the “rule.”

In summary, this is a case where the existence and validity of the underlying rule itself is being questioned. Thus, the two cases cited in the Refund Decisions, *U.S. v. Mowat*, 582 F.2d 1194 (9th Cir. 1978), and *U.S. v. Aarons*, 310 F.2d 341 (2d Cir. 1992), which involve the application of an otherwise validly adopted rule, do not apply.³

Finally, one of the six Refund Decisions failed to address an argument made in the corresponding refund request, filed by HTM, relating to a payment made in connection with Auction 91 on June 30, 2011 (the "Sixth Request"). As indicated above, five of Auction Winners' refund requests rely on Section 1.2107(c) as in effect when they paid the long-form application filing fees. The Sixth Request relies on an independent ground. Two days before the Sixth Request was filed, the Commission published Federal Register notice of an amendment to Section 1.2107(c) that eliminated the "notwithstanding" language and excepted broadcast auction long-form applications from the general exemption from paying long-form application filing fees. The Commission attempted to make the new rule effective immediately upon publication in the Federal Register, rather than 30 days after publication as required under the Administrative Procedure Act. In the Sixth Request, HTM argued that the Commission had unlawfully attempted to make the amendment to Section 1.2107(c) effective immediately and noted that HTM, along with others, had requested the Commission to reconsider this action.⁴ The Refund Decision that denies the Sixth Request does not even mention this argument.

³ Furthermore, neither *Mowat* nor *Aarons* considered the issue of compliance by the agency with 47 U.S.C. § 553(d), which provides, with exceptions not applicable here, that no substantive rule may be effective on less than 30 days' notice. The fact that the Commission did not publish the rule requiring broadcast auction winners to pay long-form application filing fees until March 27, 2013, with an effective date of April 26, 2013 (78 Fed. Reg. 18527), means that the "rule" was not even in effect during the relevant time period.

⁴ See, e.g., Petition for Reconsideration, GEN Docket No. 86-285, filed July 28, 2011, by HTM, Cross Country Communications, LLC, and Threshold Communications.

Moreover, the Commission has not ruled on the petition for reconsideration, which has been pending for almost two years.

For the foregoing reasons, the Commission should *promptly* review and reverse the Refund Decisions and refund the long-form application filing fees that Auction Winners were illegally required to pay.

Respectfully submitted,

HISPANIC TARGET MEDIA, INC.
RAMAR COMMUNICATIONS INC.
SIMON T

By: /s/ Meredith S. Senter, Jr.

Meredith S. Senter, Jr.

Lerman Senter PLLC
2000 K Street, NW
Suite 600
Washington, DC 20006
(202) 429-8970

April 26, 2013

Their Attorneys

EXHIBIT A

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

MAR 27 2013

OFFICE OF
MANAGING DIRECTOR

Meredith S. Senter, Esq.
Lerman Senter PLLC
2000 K Street, NW, Suite 600
Washington, DC 20006-1809

Re: Hispanic Target Media, Inc.
FRN 0004054797

Dear Mr. Senter:

This responds to your July 29, 2011 request for refund of application fees totaling \$31,365.00 paid by Hispanic Target Media, Inc. (HTM) in conjunction with the filing of long form construction permit applications (FCC Form 301) following the conclusion of Auction No. 91. For the reasons stated below, payment of the fees was correct and no refund is warranted.

You contend that no filing fees were required pursuant to section 1.2107(c) of the rules, which states that high bidders in spectrum auctions need not submit an additional application fee notwithstanding any other provision of our rules. Section 1.2107(c) is one of the uniform competitive bidding rules that the Commission adopted in 1997 for non-broadcast spectrum auctions. *Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, Third Report and Order and Second Further Notice of Proposed Rulemaking in WT Docket No. 97-82 and ET Docket No. 94-32*, 13 FCC Rcd 374 (1997) (*Third Report and Order*). The Commission stated that the rules adopted in the *Third Report and Order* would apply to all auctionable services, unless the Commission determined that with regard to particular matters the adoption of service-specific rules was warranted. *Id.* at 382.

The Commission subsequently adopted service-specific rules for broadcast service auctions in 1998, and stated that those rules would apply to all broadcast service auctions. *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, MM Docket No. 97-234, First Report and Order*, 13 FCC Rcd 15920, 15923 (1998) (*Broadcast Auction Report and Order*). At paragraph 164 of the *Broadcast Auction Report and Order* the Commission stated that winning bidders' Form 301 applications should be filed pursuant to the rules governing the relevant broadcast service and according to any procedures set out by public notice, and specifically stated that the statutorily established application fees would apply to the long-form applications filed by winning bidders. *Id.* at 15984.

The Public Notice issued after the close of Auction 91 directed all winning bidders to electronically file Form 301 through the Media Bureau's Consolidated Database System (CDBS) no later than June 30, 2011, and encouraged applicants to pay the FCC Form 301 application filing fee electronically using the CDBS filing system. *Auction of FM Broadcast Construction Permits Closes*, 26 FCC Rcd 7541, 7546 (2011) (*Auction 91 Closing Notice*). In compliance with the *Broadcast Auction Report and Order* and the *Auction 91 Closing Notice*, HTM paid the fee at the prescribed time and in the correct amount. This

demonstrates that HTM had actual and timely knowledge of the requirement that winning bidders in media service auctions must pay the prescribed application fee when filing a Form 301 long-form construction permit application. A party with actual and timely notice of a requirement is bound by its terms. See *United States v. Mowat*, 582 F.2d 1194, 1201-02 (9th Cir. 1978); *United States v. Arons*, 310 F.2d 341, 348 (2nd Cir. 1962).

For these reasons your request for refund of the application fees is denied.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark Stephens', with a long horizontal flourish extending to the right.

Mark Stephens
Chief financial Officer

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

MAR 27 2013

OFFICE OF
MANAGING DIRECTOR

Meredith S. Senter, Esq.
Lerman Senter PLLC
2000 K Street, NW, Suite 600
Washington, DC 20006-1809

Re: Hispanic Target Media, Inc.
File No. BNPH-20091019ADE
BNPH-20091019ADD
BNPH-20091019ADC
BNPH-20091019ADB
BNPH-20091019ACQ
BNPH-20091019ACS
BNPH-20091019ACT
BNPH-20091019ACY
BNPH-20091019ACX
FRN 0004054797

Dear Mr. Senter:

This responds to your July 27, 2011 request for refund of application fees totaling \$30,285.00 paid by Hispanic target Media, Inc. (HTM) in conjunction with the filing of long form construction permit applications (FCC Form 301) following the conclusion of Auction No. 79. For the reasons stated below, payment of the fees was correct and no refund is warranted.

You contend that no filing fees were required pursuant to section 1.2107(c) of the rules, which states that high bidders in spectrum auctions need not submit an additional application fee notwithstanding any other provision of our rules. Section 1.2107(c) is one of the uniform competitive bidding rules that the Commission adopted in 1997 for non-broadcast spectrum auctions. *Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, Third Report and Order and Second Further Notice of Proposed Rulemaking in WT Docket No. 97-82 and ET Docket No. 94-32*, 13 FCC Rcd 374 (1997) (*Third Report and Order*). The Commission stated that the rules adopted in the *Third Report and Order* would apply to all auctionable services, unless the Commission determined that with regard to particular matters the adoption of service-specific rules was warranted. *Id.* at 382.

The Commission subsequently adopted service-specific rules for broadcast service auctions in 1998, and stated that those rules would apply to all broadcast service auctions. *Implementation of Section 309(f) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, MM Docket No. 97-234, First Report and Order*, 13 FCC Rcd 15920, 15923 (1998) (*"Broadcast Auction Report and Order"*). At paragraph 164 of the *Broadcast Auction Report and*

Order the Commission stated that winning bidders' Form 301 applications should be filed pursuant to the rules governing the relevant broadcast service and according to any procedures set out by public notice, and specifically stated that the statutorily established application fees would apply to the long-form applications filed by winning bidders. *Id.* at 15984.

The Public Notice issued after the close of Auction 79 provided that "In accordance with the Commission's rules, electronic filing of FCC Form 301 must be accompanied by the appropriate application filing fee," and referenced the fee requirement contained in Paragraph 164 of the *Broadcast Auction Report and Order: Auction of FM Broadcast Construction Permits Class*, 24 FCC Rod 11903, 11908 (2009) (*Auction 79 Closing Notice*). In compliance with the *Broadcast Auction Report and Order* and the *Auction 79 Closing Notice*, HTM paid the fees at the prescribed time and in the correct amounts. This demonstrates that HTM had actual and timely knowledge of the requirement that winning bidders in media services auctions must pay the prescribed application fee when filing a Form 301 long-form construction permit application. A party with actual and timely notice of a requirement is bound by its terms. *See United States v. Mowat*, 582 F.2d 1194, 1201-02 (9th Cir. 1978); *United States v. Acorn*, 310 F.2d 341, 348 (2nd Cir. 1962).

For these reasons your request for refund of the application fees is denied.

Sincerely,



Mark Stephens
Chief Financial Officer

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

MAR 27 2013

OFFICE OF
MANAGING DIRECTOR

Meredith S. Senter, Jr.
Lernan Senter PLLC.
2000 K Street, NW, Suite 600
Washington DC 20006-1809

Re: Hispanic Target Media, Inc.
FRN 00011335098

Dear Mr. Senter:

This responds to your July 27, 2011 request for refund of a \$2,980.00 application fee paid by Hispanic Target Media (HTM) in conjunction with the filing of a long form construction permit application (FCC Form 301) following the conclusion of Auction No. 62. For the reasons stated below, payment of the fee was correct and no refund is warranted.

You contend that no filing fee was required pursuant to section 1.2107(c) of the rules, which states that high bidders in spectrum auctions need not submit an additional application fee notwithstanding any other provision of our rules. Section 1.2107(c) is one of the uniform competitive bidding rules that the Commission adopted in 1997 for non-broadcast spectrum auctions. *Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, Third Report and Order and Second Further Notice of Proposed Rulemaking in WT Docket No. 97-82 and ET Docket No. 94-32*, 13 FCC Red 374 (1997) (*Third Report and Order*). The Commission stated that the rules adopted in the *Third Report and Order* would apply to all auctionable services, unless the Commission determined that with regard to particular matters the adoption of service-specific rules was warranted. *Id.* at 382.

The Commission subsequently adopted service-specific rules for broadcast service auctions in 1998, and stated that those rules would apply to all broadcast service auctions. *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, MM Docket No. 97-234, First Report and Order*, 13 FCC Red 15920, 15923 (1998) (*Broadcast Auction Report and Order*). At paragraph 164 of the *Broadcast Auction Report and Order* the Commission stated that winning bidders' Form 301 applications should be filed pursuant to the rules governing the relevant broadcast service and according to any procedures set out by public notice, and specifically stated that the statutorily established application fees would apply to the long-form applications filed by winning bidders. *Id.* at 15984.

The Public Notice issued after the close of Auction 62 provided that "In accordance with the Commission's rules, electronic filing of FCC Form 301 must be accompanied by the appropriate application filing fee," and referenced the fee requirement contained in Paragraph 164 of the *Broadcast Auction Report and Order*. *Auction of FM Broadcast Construction Permits Closes*, 21 FCC Red 1071,

1076 (2006) (*Auction 62 Closing Notice*). In compliance with the *Broadcast Auction Report and Order* and the *Auction 62 Closing Notice*, HTM paid the fee at the prescribed time and in the correct amount. This demonstrates that HTM had actual and timely knowledge of the requirement that winning bidders in media service auctions must pay the prescribed application fee when filing a Form 301 long-form construction permit application. A party with actual and timely notice of a requirement is bound by its terms. See *United States v. Mowat*, 582 F.2d 1194, 1201-02 (9th Cir. 1978); *United States v. Aarons*, 310 F.2d 341, 348 (2nd Cir. 1962).

For these reasons your request for refund of the application fee is denied.

Sincerely,



Mark Stephens
Chief financial Officer

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

MAR 27 2013

OFFICE OF
MANAGING DIRECTOR

Meredith S. Senter, Jr.
Lerman Senter PLLC
2000 K Street, NW, Suite 600
Washington DC 20006-1809

Re: Hispanic Target Media, Inc.
FRN 0011335098

Dear Mr. Senter:

This responds to your July 27, 2011 request for refund of application fees totaling \$20,860.00 paid by Hispanic Target Media (HTM) in conjunction with the filing of long form construction permit applications (FCC Form 301) following the conclusion of Auction No. 37. For the reasons stated below, payment of the fees was correct and no refund is warranted.

You contend that no filing fees were required pursuant to section 1.2107(c) of the rules, which states that high bidders in spectrum auctions need not submit an additional application fee notwithstanding any other provision of our rules. Section 1.2107(c) is one of the uniform competitive bidding rules that the Commission adopted in 1997 for non-broadcast spectrum auctions. *Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, Third Report and Order and Second Further Notice of Proposed Rulemaking in WT Docket No. 97-82 and ET Docket No. 94-32*, 13 FCC Red 374 (1997) (*Third Report and Order*). The Commission stated that the rules adopted in the *Third Report and Order* would apply to all auctionable services, unless the Commission determined that with regard to particular matters the adoption of service-specific rules was warranted. *Id.* at 382.


The Commission subsequently adopted service-specific rules for broadcast service auctions in 1998, and stated that those rules would apply to all broadcast service auctions. *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, MM Docket No. 97-234, First Report and Order*, 13 FCC Red 15920, 15923 (1998) (*Broadcast Auction Report and Order*). At paragraph 164 of the *Broadcast Auction Report and Order* the Commission stated that winning bidders' Form 301 applications should be filed pursuant to the rules governing the relevant broadcast service and according to any procedures set out by public notice, and specifically stated that the statutorily established application fees would apply to the long-form applications filed by winning bidders. *Id.* at 15984.

The Public Notice issued after the close of Auction 37 provided that "In accordance with the Commission's rules, electronic filing of FCC Form 301 must be accompanied by the appropriate application filing fee," and referenced the fee requirement contained in Paragraph 164 of the *Broadcast Auction Report and Order. Auction of FM Broadcast Construction Permits Closes*, 20 FCC Red 1021, 1025 (2004) (*Auction 37 Closing Notice*). In compliance with the *Broadcast Auction Report and Order*

and the *Auction 37 Closing Notice*, HTM paid the fees at the prescribed time and in the correct amounts. This demonstrates that HTM had actual and timely knowledge of the requirement that winning bidders in media service auctions must pay the prescribed application fee when filing a Form 301 long-form construction permit application. A party with actual and timely notice of a requirement is bound by its terms. See *United States v. Mowat*, 582 F.2d 1194, 1201-02 (9th Cir. 1978); *United States v. Aaronis*, 310 F.2d 341, 348 (2nd Cir. 1962).

For these reasons your request for refund of the application fees is denied.

Sincerely,



Mark Stephens
Chief Financial Officer